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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 29, 1952 (R. 128), which denied in part the petition of the Board for enforcement of its order against Seven-Up Bottling Company of Miami, Inc.

OPINIONS BELOW

The opinion of the court below (R. 124-128), is reported at 196 F. 2d 424. The findings of fact, conclusions of law, and order of the Board (R. 71-114) are reported at 92 NLRB 1622.

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 128). A petition for rehearing,

filed by the Company on May 16, 1952, was denied on June 18, 1952 (R. 129, 134). The decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 136-138). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Since its decision in *F. W. Woolworth Company*, 90 NLRB 289, the National Labor Relations Board has determined the back pay to which an employee discriminatorily denied employment is entitled by computing the employee's net loss in earnings for each three-month calendar period and totalling the quarterly net losses. Under this method of computation, earnings in any quarter which exceed the amount the employee would have earned in the employment from which he was discriminatorily barred are not treated as diminishing the net loss for any other quarter. The question presented is whether the Board may use this method of computing back pay or whether, as the court below held, the Board must use its former method of deducting from the amount the employee would have earned in the job he was discriminatorily denied, during the period of discrimination taken as a whole, the employee's total earnings in other employment for that period.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C.,

Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 16-18.

STATEMENT

The Board found that eleven employees had been discriminatorily denied reemployment by the Company at the end of a strike (R. 74-75, 102-104), and ordered their reinstatement with back pay (R. 76-77, 105-106). The order directed that back pay "be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*," 90 NLRB 289, decided on June 12, 1950 (R. 106). In *Woolworth*, the Board discontinued its previous method of computing net loss of earnings by deducting from the amount the employee would have earned absent discrimination all sums earned throughout the entire period from the date of discrimination to the date of an offer of reinstatement by the employer or waiver of reinstatement by the employee (90 NLRB, at 291). In its stead, the Board adopted the method of computing the net loss during each three-month calendar period, and of totalling the net losses for each quarter to determine the back pay due. Under this method, earnings in one quarter greater than the employee would have obtained in the position from which he was discriminatorily barred are not carried over from one quarter to another to diminish the employee's recovery (90 NLRB, at 292-293).

In *Woolworth*, the Board stated the reasons which underlay its adoption of the new formula. The Board explained that experience had shown

that, frequently, as the period of discrimination increased, the amount of back pay due under the former method of computation decreased (90 NLRB, at 291-292):

> * * * We have noted in numerous cases that employees, after having been unemployed for a lengthy period following their discriminatory discharges, have succeeded in obtaining employment at higher wages than they would have earned in their original employments. This, under the Board's previous form of back-pay order, resulted in the progressive reduction or complete liquidation of back pay due.

The Board further explained that the result of this diminution of back pay was to devitalize the reinstatement remedy (90 NLRB, at 292):

> The deleterious effect upon the companion remedy of reinstatement has been twofold. Some employers, on the one hand, have deliberately refrained from offering reinstatement, knowing that the greater the delay, the greater would be the reduction in back-pay liability. Thus, a recalcitrant employer may continue to profit by excluding union adherents from his enterprise. Employees, on the other hand, faced with the prospect of steadily diminishing back pay, have frequently countered by waiving their right to reinstatement in order to toll the running of back pay and preserve the amount then owing. Upon analysis of a substantial number of cases involving such action, we have found the economic motivation

and compulsion upon the employee not difficult to discern. Unemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even in deprivation of the necessities of life. Our observation on this score accords with the view of the United States Supreme Court which, in treating this general problem, recognized that the worker is "not likely to have sufficient resources" to sustain the necessary "minimum standard of living necessary for health, efficiency, and general well-being" during such periods." [*Brooklyn Saving Bank* v. *O'Neil*, 324 U. S. 697, 707.] The consequent desire of the victim of discrimination to recoup the maximum amount possible in order to offset such losses, even if this must be accomplished at the price of relinquishing the right to be returned to his former position, may readily be anticipated. The Board has viewed these results with concern because we, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided by the Act for expunging the effects of unfair labor practices and maintaining industrial peace." [*Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 195.]

The Board concluded that its duty in unfair labor practice cases to seek "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations*

Board, 313 U. S. 177, 194, quoted in 90 NLRB, at 292) could best be fulfilled if back pay were computed by quarterly periods, with earnings for any single quarter having no effect upon back pay liability for any other quarter. This, the Board determined, would "constitute an appropriate, fair and practicable method of computation," referring the liability to current factors and avoiding the possibility of later fluctuations which had been found to impair the reinstatement remedy. 90 NLRB, at 293. Finally, the Board observed (*ibid.*) that its revised formula "conforms with and facilitates the prescribed practice of the Social Security Administration," which is required, in restoring an employee's Old Age and Survivors Insurance account, to allocate payments of back pay ordered by the Board (which are "wages" within the meaning of the Social Security Act) to the calendar quarters in which the money would have been earned.

In the instant case, on the Board's petition to enforce its order (R. 1-9), the court below, granting the petition in all other respects, disapproved the computation of back pay on a quarterly basis and directed that the Board utilize its former method. The court stated that (R. 128):

> Whatever method of computation is used, there will be occasional hardship cases one way or the other, but these exceptional cases should not determine the rule. The ordinary case should be the criterion. The employee is entitled to be made whole, but no more. The

employees here involved were not compensated on a quarterly basis. We see no sufficient reason to so compute their back pay during suspension. When a hardship case arises, it can be decided on its own facts. It does not appear that these employees will not be made whole by computing their back pay continuously over the whole period of their suspension, the method followed by the Board itself prior to the *Woolworth* case. We hold such method, rather than the quarterly method, should be followed here. There is nothing to indicate that the conditions apprehended by the Board in the *Woolworth* case, exists here.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Board may not compute back pay on a quarterly basis in accordance with the *Woolworth* formula.

2. In failing to enforce the back pay order of the Board in full.

REASONS FOR GRANTING THE WRIT

1. The *Woolworth* formula for computing an employee's loss of earnings resulting from discrimination, which the court below held invalid, applies to every back pay order entered by the Board in a contested proceeding and controls, as well, the computation of back pay in cases adjusted by settlement since June 1950.[1] In the twelve-

[1] The *Woolworth* formula applies not only to back pay orders issued against employers, but also to such orders issued against unions which have caused discrimination in violation of Section 8 (b) (2) of the Act.

month period ending March 31, 1952, 162 back pay orders incorporating the *Woolworth* formula were entered in contested proceedings covering 1,484 workers, of whom 1,161 were ordered reinstated in conjunction with the award of back pay. During the same annual period, in both contested and settled cases, more than $524,000, computed in accordance with the *Woolworth* formula, was paid in back pay to 1,231 employees.

It is clear, therefore, that the validity of the Board's use of the *Woolworth* formula presents a significant question of general importance. Since discrimination against "an employee because of his union affiliations goes to the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4)), the remedy the Board may properly employ to overcome it is obviously vital. Indeed, the number of back pay orders which come before the court below alone, as well as the many Board cases arising within its judicial circuit which do not reach it for review, demonstrate the need for speedy resolution of the issue posed here.

2. In promulgating the *Woolworth* formula, the Board exercised the authority granted it by Section 10(c) of the Act to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The determination of the remedy to fit the policy is "committed to the Board," and because the relationship between the two "is peculiarly a matter for administrative competence,"

in reviewing the remedy fashioned by the Board "courts must not enter the allowable area of the Board's discretion * * *." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. Recently reiterated (*National Labor Relations Board v. Gullett Gin Company, Inc.*, 340 U.S. 361, 362-363), this standard of review was unheeded by the court below in disapproving the *Woolworth* formula.

(a). The Board's basic reason for changing the method of computing back pay was its discovery that the prior method of computation was, in practice, undermining and frustrating the equally important remedy of reinstatement. Under the former method, whenever an employee began to earn more than he would have earned in the position from which he had been discriminatorily severed, it was to the wrongdoing employer's advantage to delay reinstatement as long as possible, since the longer the delay the more his back pay liability would diminish. On the other hand, the employee in such situations was faced with the dilemma of either watching his already accumulated back pay claim steadily decrease or waiving his right to reinstatement. As the Board observed (*supra*, pp. 4-5), the severe economic detriment sustained by an employee during unemployment, which cannot be truly compensated by increased earnings over a future and protracted period, all too often induced employees to follow the latter course. The former method of computing back pay was thus tending to transform the concomitant

remedies of "reinstatement with * * * back pay" into alternative and mutually exclusive remedies.

This Court has recognized that reinstatement *with* back pay is indispensable to undo the effects of discrimination (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 193-194):

> * * * to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. * * * According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires *not only compensation for the loss of wages but also offers of employment to the victims of discrimination.* Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. [Italics added.]

When its experience showed that the former method of computing back pay was functioning as a positive deterrent to "offers of employment to the victims of discrimination", it was plainly within the discretion of the Board to adjust the means of computation to correlate with, rather than to militate against, the companion remedy of reinstatement. This the Board attempted to do by adopting a method of computation which, in part, removes the employee's incentive to waive, and the employer's incentive to delay, reinstatement.

Rejecting this solution, the court below reasoned (R. 128) that employees are "entitled to be made whole, but no more," and that computation of back pay under the revised method, because it may result in a larger recovery by the employee than he would have received under the former method, results in making the employee more than whole. But this argument rests upon the erroneous assumption that the sole appropriate basis for measuring the loss sustained by the employee is the overall period from the date discrimination begins to the date discrimination ends. The fact, as shown by the Board's experience, was that under the prior method of computation the loss period did not necessarily coincide with the total period of discrimination. When an employee waived reinstatement so that his accumulated back pay would not be depleted, the period for computing back pay ended though the employer's discrimination did not end. All that happened was that the employee, to recoup his actual losses, acquiesced in continued discrimination by relieving the employer of the obligation to offer him reinstatement. The significant difference under the *Woolworth* formula is that the employee has no need to sacrifice the reinstatement remedy in order to prevent loss or diminution of his accrued back pay claims.

Concentrating entirely upon the fallacious assumption that the overall period of discrimination is the only possible measure of the back pay which will make the employee precisely "whole," the court below excluded from consideration the impact

of this assumption upon the right to reinstatement, the very factor which led the Board to adopt the *Woolworth* rule. By viewing the back pay remedy as isolated from the related reinstatement remedy, the court assimilated the function of back pay "to the correction of private injuries" and ignored its transcendent role of vindicating a public wrong (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 192-193). Confronted with a choice between adopting a new mode of computing back pay (which may result in a larger award) or permitting enfeeblement of the reinstatement remedy, it was wholly appropriate for the Board to place a risk of increased liability upon the wrongdoer who has caused and persisted in discrimination rather than upon the employee who, having suffered discrimination, should not be further victimized by sacrifice of his right to reinstatement. Cf. *National Labor Relations Board* v. *Don Juan, Co., Inc.*, 185 F.2d 393 (C.A. 2). Even if the propriety of the Board's judgment were more doubtful, it would be clear, we submit, that, in substituting as its own the alternative the Board had found inadequate, the court below has erred in failing to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps-Dodge Corp.* v. *National Labor Relations Board*, *supra*, at 194.

(b). In disapproving the *Woolworth* formula, the court below stated (R. 128) that "exceptional cases should not determine the rule," but the "ordinary case should be the criterion," and that "what-

ever method of computation is used, there will be occasional hardship cases one way or the other." But this erroneously assumes that the *Woolworth* rule effects unnecessary revisions in back pay awards in cases for which the old method of computation would be adequate. The fact is that the *Woolworth* formula results in larger back pay awards than the old formula only in a case where, after a period of unemployment or employment at lower wages than the offending employer paid, the employee begins to earn more than he would have earned in the job which was wrongfully denied him. And it is this type of situation, where back pay liability would be diminished by continued refusal to grant the reinstatement the Act commands, which required the altered method of computation. Thus, far from effecting the aberrational change the court below erroneously envisions in cases which required no change, the Board's revised formula is precisely adapted to eliminate the impairment of the reinstatement remedy which the "cumulative experience of many years" under the old formula had revealed (90 N. L. R. B. at 291).

(*c*). The court below suggests, finally (R. 128), that "there is nothing to indicate that the conditions apprehended by the Board in the *Woolworth* case, exists here," and that "when a hardship case arises, it can be decided on its own facts."[2] This

[2] It should be noted in this connection that the Board does not take evidence on the amount of back pay at its hearing of the unfair labor practice complaint. For obvious reasons (*e.g.*, because the alleged discrimination commonly continues pending decision of the complaint), assessment of

argument, repeating the erroneous idea that the revised formula is designed to treat all cases in some peculiar way as "hardship" cases, adds the further error of denying the Board's power to proceed by general rule rather than *ad hoc* adjudication in solving the problem disposed of in the *Woolworth* decision. In meeting the evil to which the *Woolworth* formula is addressed, there is no reason to confine the Board to case-by-case litigation of the evil's manifestation. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194. On the contrary, the problem is uniquely appropriate for the promulgation of a general rule which will eliminate the incentive to the evil altogether, rather than requiring in each case a trial of the issue whether the reinstatement remedy has been frustrated as it frequently was before the *Woolworth* decision.

Moreover, experience with the *Woolworth* formula since its adoption over two years ago discloses its essential fairness in operation by the reaction of employers to it. Through March 31, 1952, $1,033,000 in back pay, computed in accordance with *Woolworth*, was paid to 2,646 workers. During the same period, some 55 back pay orders

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back pay is a matter for supplementary hearing after entry of the Board's order and after the party against whom the order is issued has agreed to comply either informally or under court decree. *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 464 (C.A. 1); *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 172 F. 2d 62 (C.A. 4); *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952 (C.A. 4); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949 (C.A. 2).

incorporating this formula came before the courts of appeals. Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons,[3] there has been no objection raised to the revised method of computation. The absence of substantial protest convincingly demonstrates that employers do not feel they are being required to pay employees more than their due.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JULY 1952.

[3] *National Labor Relations Board* v. *Pacific Mills*, C.A. 4, No. 6257, 91 N.L.R.B. 60.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*) are as follows:

"UNFAIR LABOR PRACTICES

SEC 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion

that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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